93-165
Case No.

Supreme Court
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UNITED STATES SUPREME COURT

October 1993 Term

JOHN C. TALLEY, ETC.,

Petitioner
v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When, pursuant to Rule 36 of the Federal Rules of Civil Procedure, a party is deemed to have made an admission, can the appellate court examine the admission and apply an interpretation of its factual content or meaning contrary to the lower court?

2. When, pursuant to Rule 13 of the Federal Rules of Civil Procedure, a party is deemed to have lost its right to file a compulsory counterclaim, can the appellate court nevertheless authorize the pursuit of said counterclaim upon remand without a finding of abuse of discretion by the lower court?

LIST OF PARTIES TO THIS CASE

Petitioner:	John C. Talley, individually and in his capacity as Co-Administrator of the Estate of Percy Talley
Respondent:	The United States of America

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Federal Rules of Civil Procedure:

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REFERENCE TO OPINIONS OF LOWER COURTS

1. Opinion and Order dated July 12, 1991 by the United States District Court, District of Maine in the case entitled "John C. Talley, individually & in his capacity as co-administrator of the estate of Percy Talley vs. United States of America" (Civil No. 89-0022-B)

2. Opinion of the United States Court of Appeals For the First Circuit in the case entitled "John C. Talley, Etc. vs. United States of America" (Case No. 92-1759)

STATEMENT OF GROUNDS FOR JURISDICTION

On April 14, 1993, the United States Court of Appeals For the First Circuit entered an opinion in the case entitled "John C. Talley, Etc. vs. United States of America" (Case No. 92-1759) which reversed the judgement of the United States District Court, District of Maine and remanded for further proceedings. Jurisdiction is conferred upon this Honorable Court pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES INVOLVED IN THE CASE

1. Rule 36 of the Federal Rules of Civil Procedure which provides in its entirety:

RULE 36. REQUESTS FOR ADMISSION

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements on opinions of fact or of the application of law to fact including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter,

signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as a true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that na answer by served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that

an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apple to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

2. Rule 13 of the Federal Rules of Civil Procedure which provides in its entirety:

RULE 13. COUNTERCLAIM AND CROSS-CLAIM

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the

transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, of (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counter claim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving a pleading may, with the

permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may be leave of court set up the counterclaim by amendment.

(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or party of a claim asserted in the action against the cross-claimant.

(h) Joinder of Additional Parties. Persons other than those made parties to the original actio may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claims may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

STATEMENT OF THE CASE

In October, 1989, during the discovery phase of the case before the United States District Court, District of Maine, Petitioner sent two sets of Requests for Admissions to the Respondent. Although several requests for extensions of time to respond were requested and granted to the government, the Respondent never filed its responses. Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Petitioner relied upon these admissions and presented no evidence or testimony at trial. On July 12, 1991, Chief U.S. District Court Judge Juan M. Perez-Gimenez agreed that the admissions were dispositive of the case and entered judgment in Petitioner's favor.

Also, although clearly a compulsory counterclaim as defined in Rule 13 of the

Federal Rules of Civil Procedure, the Respondent attempted to move to file the counterclaim approximately one week before the trial date which was almost eighteen (18) months after filing of the Complaint. Although the motion was denied, it was raised again at trial. Again it was denied.

On June 25, 1992, Respondent filed a timely appeal to the United States Court of Appeals For the First Circuit. The First Circuit's jurisdiction was based upon 28 U.S.C. § 1291.

Respondent argued that the admissions were misinterpreted by the district court and the court abused its discretion in denying Respondent's motion to file a compulsory counterclaim. After hearing and briefs thereon, Circuit Judge Boudin ruled that the district court had misinterpreted the meaning of Request No. 12 of the

admissions and remanded for further proceedings. Judge Boudin also ruled that the interest of justice required allowing Respondent to pursue its counterclaim upon remand.

ARGUMENT IN FAVOR OF ALLOWANCE OF THE WRIT

Petitioner feels that the appellate court has exceeded its authority by substituting its own findings of fact for that of the trial court. The First Circuit redefined the meaning of one of the requests for admission and remanded for further proceedings based upon this new meaning. It is Petitioner's position that this action constitutes a substantial departure from existing precedent and should be examined.

Further, the allowing of the compulsory counterclaim upon remand permits the circumvention of the purpose and intent of the Rules of Civil Procedure. A thorough examination of the proposed counterclaim will reveal that it is merely a veiled attempt to accomplish the same thing as withdrawal of the admissions. The First Circuit fails to find any abuse of

discretion by the trial court yet nevertheless overrules its decision. Again, this is a departure from established precedent and should be examined.

For these reasons, Petitioner requests this Honorable Court allow this Petition For Writ of Certiorari in order to review the decisions of the First Circuit.

Respectfully submitted,

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DATE: July 12, 1993

CERTIFICATION OF SERVICE

I hereby certify that three (3) copies of the within Petition For Writ of Certiorari were mailed postage prepaid, first class, on this _____ day of July, 1993 to the following:

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Acting Assistant Attorney General

GARY R. ALLEN
KENNETH L. GREENE
PAULA K. SPECK
Attorneys Tax Division

Department of Justice
Post Office Box 502
Washington, D.C. 20044

APPENDIX

Attached hereto are copies of the following:

1. Opinion of the United States Court of Appeals For The First Circuit (Case No. 92-1759) dated April 14, 1993 whose decision is sought to be reviewed.

2. Opinion and Order of the United States District Court For The District of Maine (Civil No. 89-0022-B) duly entered July 12, 1991.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

NO. 92-1759

JOHN C. TALLEY, ETC.,
Plaintiff, Appellee,

v.

UNITED STATES OF AMERICA,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF MAINE
[Hon. Juan M. Perez-Gimenez,
U.S. District Court]

Before
Breyer, Chief Judge,
Cyr and Boudin, Circuit Judges.

D. Patrick Mullarkey, Attorney, Department of Justice, with whom Richard S. Cohen, United States Attorney, James A. Bruton, Acting Assistant Attorney General, Gary R. Allen, Attorney, Department of Justice, Kenneth L. Greene, Attorney, Department of Justice, and Paula K. Speck, Attorney, Department of Justice, were on brief for appellant.

Joseph J. Rodio with whom Jeffrey M. Gibson, Charles D. Mills and Rodio & Ursillo, Ltd. were on brief for appellee.

April 14, 1993

BOUDIN, Circuit Judge. This case started as a dispute between John Talley ("Talley"), co-executor of the estate of Percy Talley, and the United States over the tax liability of the estate. The tax issues have become snarled in confusion wrought by a cryptic notice from the Internal Revenue Service, a loosely worded request to admit filed by Talley, and a set of litigation errors by the government. After trial, the district court entered judgment for Talley on his tax refund claim and disallowed the government's effort to assert a counterclaim. We reverse the district court and remand for further proceedings.

I. THE FACTS

In October 1984, Talley, acting as co-executor for the estate, entered into a stipulation with the IRS regarding the amount of taxes owed by the estate. This

stipulation, filed in the Tax Court, provided that the estate's total tax liability was $345,103.21. Of this, $222,000 had been paid, leaving an outstanding liability of $125.103.21. The stipulation also provided that the estate could submit proof that it had paid certain state taxes, which would further reduce its outstanding liability. The stipulation also noted that of the $345,103.21 tax liability, $288,836.97 had been "assessed" and $56,266.24 was a "[d]eficiency (to be assessed)."[1]

In November 1984, the IRS sent the estate a notice which, as it is the cause of half the confusion, requires description. Under the heading "Statement

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[1]Assessment is the formal step in which the IRS determines that a specific amount of tax is currently due and owing to the government from the taxpayer, making the taxpayer liable for that amount. Rambo v. United States, 492 F.2d 1060, 1061 n.1 (6th Cir. 1974), Cert. Denied, 423 U.S. 1091 (1976).

of Tax Due On Federal Tax Return," it showed as the first entry in the "Assessment" column the figure $56,266.24, designated "tax"; under this was the figure $1,478.80, designated "int", presumably interest. The second column, under the heading "Adjustment or Credit," contained the figure $57,767.39, apparently designed to reflect credits against liability allowed by the IRS. Finally, in a third column headed "Balance Due" there appeared the figure $977.65, which reflected the difference between the first column figures and the second column figure. In January 1985, the estate paid this net amount, $977.65.

Six months later, in May 1985, the IRS sent the estate a "Statement of Adjustment to Your Account," fixing the estate's outstanding tax liability at $294,046. The stated liability, much above the net amount due under the Tax Court stipulation,

appears to include penalties and interest not previously assessed. In any event, the estate declined to pay. In response, the IRS began to levy on bank accounts held by the estate and its distributees, ultimately collecting approximately $94,000. In the government's view, it was still owed at least $200,000, with interest continuing to accrue. Talley, by contrast, took the position that no taxes were owing and that the levies were therefore unlawful.

After exhausting administrative remedies, the estate in January 1989 filed a complaint in the district court seeking a refund of the approximately $94,000. The complaint contended that the estate's outstanding tax liability had been wholly eliminated prior to the levies. Talley's complaint averred that this happy situation resulted from a combination of state tax credits, allegedly amounting to $77,544, and the November 1984 notice, which

(according to the complaint) "zeroed out" any remaining obligations of the estate to the IRS. The concept of "zeroing out" was not explained in the complaint, nor has it been explained since.

Although the government believed that it was still owed $200,000 or more by the estate, it neglected in answering the complaint to file a timely counterclaim for the balance. See Fed. R. Civ. P. 13. It then failed to respond at all to Talley's request for admissions served on the government on October 11, 1989, pursuant to Fed. R. Civ. P. 36. Request no. 12 asked the government to admit that the estate's $977 disbursement in response to the November 1984 notice "constituted full payment of the balance due on the estate of Percy Talley as set forth in that notice." Under Fed. R. Civ. P. 36(a), the failure to respond to a such a request is deemed a binding admission, unless the court later

grants leave under Fed. R. Civ. P. 36(b) to withdraw the admission.

New government counsel took over the case in spring 1990, and the case was set for trial in July 1990. In June 1990 the government sought leave to amend its answers and assert a counterclaim. The government's excuse for this belated action was that at the time of the original answer, counsel had lacked the Secretary of the Treasury's approval to assert a counterclaim. That motion was denied by the district court on June 19, 1990, even though in the meantime the court had (for other reasons) deferred the trial until October 1990. The court's reasons for refusing to allow the counterclaim are discussed more fully below.

Government counsel also advised the district court in June 1990 that the government would promptly file a motion seeking leave to withdraw its admission by

default to request no. 12. The government never filed such a motion, later taking the view (in a pretrial statement filed on September 10, 1990) that the admission was literally accurate and harmless to the government's position. The government's new interpretation was that it had properly admitted that the $977 payment constituted full payment of the estate's liability "as set forth in" the notice; but since the notice was inaccurate, this admission (the government argued) did not established that the payment discharged the taxpayer's actual liability.

A trial was held before the district court on October 12, 1990. At trial, Talley based its refund claim primarily upon the government's admission to request no. 12. Over Talley's objection, the court permitted the government to introduce evidence of Talley's tax liability according to the government's calculations.

But the court accepted the evidence subject to the court's reserved ruling on Talley's claim that the government's admission of request no. 12 barred the evidence and resolved the case. The court stated:

> Just so we are clear, I'm allowing [the government] to present this evidence because I do not know what I'm going to do and I wouldn't like to have to come back and get some more testimony . . . [i]f I decide that you are stuck with your admission . . ., it would mean you would be precluded.

The government also moved to amend its pleadings to conform to the evidence introduced.

After trial, the district court issued a memorandum opinion in which it rejected the government's interpretation of request no. 12, and concluded that the request referred to the estate's actual liability. The court held that the admission conclusively established that the estate's $977 payment satisfied its total tax liability, and the court therefore entered

judgment in favor of the estate for the approximately $94,000 seized from the estate's bank accounts. The government then appealed, arguing that its admission pursuant to request no. 12 had been wrongly construed and that its counterclaim should have been allowed.

II. DISCUSSION

Talley has not claimed in this court any prejudicial reliance on the original November 1984 notice. It would be difficult as a factual matter to make any such claim since about six months later the IRS asserted that the estate owed over $294,000, and there is no indication that in the meantime any detrimental reliance had occurred. Indeed, authorities do not give much comfort to taxpayers involving estoppel even when there has been reliance. On the contrary, the government has even prosecuted taxpayers for cashing refund checks issued in error. See, e.g., United

States v. McRee, 984 F.2d 1144 (11th Cir. 1993).

Talley's position on appeal, however, does not depend directly on the original notice or upon estoppel doctrine. Rather, it is based upon request no. 12 which the government "admitted" by failing to answer. The district court read the request, as admitted, to establish that the estate's total tax liability in November 1984 was only $977.66. An admission under Fed. R. Civ. P. 36(a) is, by the terms of the rule, binding on the party making the admission and cannot be contradicted. Thus, if the district court properly construed request no. 12, the government was bound by its admission (unless the court sua sponte should have permitted the government to withdraw the admission).

Although the question is a close one, we believe that both the November 1984 notice and request no. 12 have been

misconstrued. The construction of documents presents, in the absence of contested background facts, a pure issue of law open to de novo review. See Trust Under the Will of Bingham v. Commissioner, 325 U.S. 365, 379-90 (1945). The district court's effort at construction was complicated by the government's own changes in position and its failure adequately to place the documents in context. Nevertheless, we conclude that the original November 1984 notice did not state that the estate's total tax liability was only $977, and the admission by default to request no. 12 did not do so either.

The November 1984 notice is, of course, an opaque and potentially misleading document, but in these respects it does not differ from many IRS notices apparently generated by computers. No doubt taken in isolation the notice could be misunderstood by a lay reader to suggest

that the estate owed only $977; but it cannot be taken in isolation and that is not what it says. Juxtaposed with the Tax Court stipulation, it is clear that the November 1984 notice merely reflects three separate tax events: the original additional deficiency assessment promised by the stipulation ($56,266.24), plus a small amount of accrued interest ($1,478), minus credits ($57,767.39) allowed by the IRS to reduce the estate's outstanding liability.

The net effect of these three adjustments was to increase the estate's assessed liability by $977.65 ($56,266.24 + $1,478 - $57,767.39). That figure was, as the notice said, a "Balance Due" but only as the net result of the three adjustments. The notice did not say that the balance-due figure captured the estate's total tax liability. One who looked only at the notice might think

otherwise, but any lawyer or estate executor who looked also at the stipulation would understand how these figures fit together and recognize the limited role of the notice. Indeed, only a month before the estate had stipulated to a vastly larger debt of $123,103.21 ($66,836.97 assessed but unpaid plus $56,266.24 not yet assessed but conceded) and had apparently made not payments since then.[2]

This brings us to request no. 12. This request was the last one in Talley's first set of requests to admit, and it followed 11 individual paragraphs that asked only that the government admit that the listed documents (in the first 11 request paragraphs) were "true copies" of

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[2]In other words, as of October 29, 1984, the estate had agreed that it owed $123,103.21. The IRS notice the next month allowed a credit of only $57,767.39, so--quite apart from any accrued interest or penalties--Talley should have known that over $65,000 remained unpaid as of the date of the notice.

what they purported to be. No. 12 was worded somewhat differently:

Request No. 12

> 12. Admit that the payment of Nine Hundred Seventy-seven ($977.65) Dollars and 65/100 by John Talley concerning the Notice of Tax Due dated November 29, 1984 (Exhibit 1), constituted full payment of the balance due on the estate of Percy Talley as set forth in that notice.

This last request, whether deliberately or not, is an invitation to confusion. First, it misstates by implication the gist of the notice, leaving the impression (with the words "full payment") that total tax liability was the subject of the notice when in fact the notice did not reflect the total balance due from the estate. Second, by ending with the phrase "as set forth in that notice," the request allows one reader to think that an admission would merely concede that the estate had in fact paid the amount "set forth in the notice" and

another reader to think that it would concede that the notice correctly stated the estate's tax liability.

Of course, neither reader makes much sense. The first reading of the request asks the government to admit a fact that no one would dispute; the second, to admit a point that the government could not ever intentionally since--apart from inaccuracy--it would give away the lawsuit. If the government had bothered to read the request, presumably it would have said in response that the payment of $977.65 did constitute "full payment" of the amount stated in the notice but that the amount stated at the end of the notice did not reflect--or even purport to reflect--the full tax liability of the estate. Instead, the government let the request go unanswered.[3]

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[3]When it got around to reading the request in June 1989, the government then compounded the confusion by first reading the request as Talley now urges (and

In all events, we think that request no. 12, read against the background of the October 1984 stipulation and the November 1984 notice, cannot fairly be read as a request by Talley that the government admit that the $977.65 payment satisfied the actual total liability of the estate. To the extent that the request is ambiguous, the ambiguity is to be construed against Talley (whose lawyer drafted the request). See Dixon v. Commissioner, 62 T.C.M. (C.C.H.) 1440, 1511 (1991). And to the extent that common sense is a guide to construction, a reading that trivializes the request is preferred to one that renders the request absurd. In short, treating the government as bound by its admission of the request, we believe it has

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telling the district court that it would move to withdraw the admission) and then reading the request merely to admit that the amount stated in the request had been paid (making a withdrawal of the admission unnecessary).

admitted only what it has never denied: that the $977.65 payment corresponded to the amount set forth in the notice.

Since in our view the district court misconstrued request no. 12, its judgment in favor of Talley--which rests solely on the government's admission of request no. 12--cannot stand. The scope of the remand is addressed at the conclusion of this opinion. We do not reach the government's alternative argument that, if the request were read in Talley's favor, then the government should have been permitted to withdraw its admission. Such an argument itself raises troublesome questions that we readily leave for another day.[4]

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[4]For example, whether Talley's reliance on the admission was unreasonable; whether Talley would suffer any "prejudice" from a belated withdrawal in the technical sense specified by Rule 36(b); and whether the government's motion to conform the pleadings to the evidence could be construed as an implied, conditional request to withdraw the admission.

The other issue presented by the government on this appeal is whether the district court erred when it refused to permit the government belatedly to file a counterclaim. It will be recalled that Talley sued the government to recover the levies against the estate bank account amounting to about $94,000. From the government's standpoint, not only did Talley have no right to a refund but, in addition, the estate still allowed the government for unpaid taxes, penalties and interest, which the levies had only partially recovered. It is undisputed that the government's claim for any balance due is a compulsory counterclaim which, if not properly asserted in this case, is lost forever. Fed. R. Civ. P. 13(a).

Under the rules, the government should have asserted its counterclaim when answering Talley's complaint. Fed. R. Civ. P. 13(a). Instead, it waited for over a

year and a half to do so, explaining that it had not asserted the claim in its answer because it needed to await approval from the Secretary of the Treasury. At the time its motion to amend the answer was filed in June 1990, the case was then on the eve of trial. The trial date was than postponed for several months, from June to October, when the government proposed to call Talley's counsel as a witness, but the district court nevertheless ruled after the postponement that the motion for leave to file the counterclaim came too late.

"It is incomprehensible," said the district court, "that it took the government well over one year to obtain authority from the Secretary of the Treasury . . ." The court also said that allowing the counterclaim at this point would expose Talley "to significant prejudice at this stage of the proceeding," as well as "to substantial inconvenience."

The district court did not explain the basis for any finding of either prejudice or inconvenience. Talley's memorandum opposing the motion to assert the counterclaim did make a claim of prejudice; in somewhat veiled fashion, it suggested that, if the estate had been timely advised of the counterclaim, it would have summoned witnesses to show that oral statements of an IRS representative in July 1988 conceded "that no liability remained with regard to this estate."

How this issue-the district court's refusal to permit a belated counterclaim--should be resolved in the ordinary case is open to debate. On the one hand, the government's 18-month delay in advancing its counterclaim is substantial and its excuses lame; perhaps the Secretary had not approved the counterclaim when the answer was due but that did not require the government to wait for 18 months, until

after discovery was completed, to assert a counterclaim that was evident from the outset. Trial judges, who have considerable discretion in such matters, are understandably loath to entertain new claims in June when trial is scheduled for July, when discovery has been completed, and when the government has little excuse for so long a delay in asserting its claim.

The government, on the other hand, reasonably argues that its counterclaim motion was not resolved until after the trial had been postponed until October, alleviating inconvenience. More important, virtually the same evidence the government would be expected to offer to refute Talley's refund claim would, if the government's proof were valid, also establish its own right to affirmative recovery. Finally, the only "prejudice" from a withdrawal described by Talley is not very persuasive: Talley's bare claim

of an IRS oral misstatement in 1988 would not, even if proved, establish a conventional estoppel, no detriment of reliance having been described; and even a conventional estoppel might well not prevail against the government in a tax case. Office of Personnel Management v. Richmond, 496 U.S. 414, 427 (1990) ("not a single [Supreme Court] case has upheld an estoppel claim against the government for the payment of money").

We have concluded that in the somewhat unusual circumstances of this case, we need not decide whether the district court in July 1990 should have allowed the counterclaim to be pleaded. Here, a reopening of the trial record is warranted, in the interests of justice, based solely upon our decision that the district court misread request no. 12. Strictly speaking Talley could be held to the proof it offered at trial, which was little beyond

the admission to request no. 12. But we think that the government bears much of the responsibility for the imbroglio, first by not responding to the request, and then by offering inconsistent readings of it to the district court. Thus, our remand will permit Talley to assert whatever evidence it has or can develop in a reasonable time to support its refund claim and to contest the government computations on a basis other than request no. 12.[5]

By the same token, we think that in the interests of justice, the government should be entitled to assert its counterclaim. Whatever the situation may have been in July 1990, Talley now has ample time to adduce whatever facts may be relevant to either the refund claim or the counterclaim--and they are likely to be

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[5]There is no reason why this opportunity should not include reasonable additional discovery if Talley provides the district court with a basis to think discovery might be fruitful.

pretty much the same facts. There is no surprise element now and the trial record must be reopened in any event to permit Talley to support its refund claim. Our outcome--allowing Talley to pursue his refund claim and the government to pursue its counterclaim--appears to us to be the most equitable way to shape the required remand.

The judgment of the district court is vacated and the case remanded for further proceedings in accordance with this opinion.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MAINE

John C. Talley, Individually, and as Co-Administrator of the Estate of Percy Talley, Plaintiff v. United States of America, Defendant	Civil No. 89-22B

OPINION AND ORDER

The primary question to be resolved by this Court in this suit is the effect to be given to the admissions made under Rule 36 of the Federal Rules of Civil Procedure because of a party's failure to respond timely to a request thereof after trial has commenced.

On October 12, 1989, plaintiff sent defendant, United States of America, the following request for admission: "Admit that the payment of Nine Hundred Seventy-Seven and 65/100 ($977.65) dollars by John

Talley concerning the notice of tax due dated November 29, 1984, (Exhibit 1) constituted full payment of the balance due on the Estate of Percy Talley as set forth in that notice.[1] Defendant all through the litigation of the case at bar never answered Request No. 12 even though it knew this request was at the heart of plaintiff's case.[2] The Government stated in its first trial brief its intention to withdraw its admission by default but failed to file a motion thereto. Finally, it admitted Request No. 12 contending that such an admission is far different from an admission that plaintiff fully paid the balance due on the estate tax liability. It is plaintiff's position that defendant, United States of American, has admitted, pursuant to its Request for Admission No.

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[1]Request for admission, No. 12 (first set) (Exhibit 4).

[2]Defendant's Post Trial Brief, pp. 2-3.

12, that the estate tax liability has been paid in full. Plaintiff proceeded to try this case as it did based on such an admission.

Defendant's main concern during the course of the litigation was that an admission of Request No. 12 would result in an admission that, by payment of $977.54, John Talley fully paid the balance owed on the tax liability of the Estate of Percy Talley. Such an admission in defendant's view would be contrary to law and to its position all throughout the proceeding. In spite of this concern defendant failed to file any motion to withdraw and/or amend its admission. It was not until trial that defendant pointed out that the notice relied upon by plaintiff on forming Request No. 12 was erroneous.

Rule 36 provides in pertinent part:

> (a) Request for admission. A party may serve upon any other party a written request for the admission ... of the truth of any matters ... that relate to

> statements or opinions of fact or of the application of law to fact ... the matter is admitted unless, within 30 days after service of the request ... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection...
>
> (b) Effect of Admission. any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

Under Rule 36, if a party fails timely to answer a request of admissions, the requested items are deemed admitted. Any matter thus admitted under the rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. See Brook Village North Associates v. General Electric Co., 686 F.2d 66, 70 (1st Cir. 1982); Rainbolt v. Johnson, 699 F.2d 767, 768 (D.C. Cir. 1981); United States v. Kenealy, 646 F.2d 699 (1st Cir. 1981), cert. denied, 454 U.S. 941, 102 S.Ct. 478 (1981).

Rule 36 is designed to expedite

litigation and permits parties securing admissions to rely on their binding effect. See Reinbold v. Johnson, supra, at 70.[3] Plaintiff in the case at bar relied entirely on the admission of Request No. 12 by default of defendant to prepare for trial.

The United States' admission of plaintiff's two sets of admissions request arose, pursuant to Fed. R. Civ. P. 36, by its failure to respond to those requests. At the pretrial conference held on June 15, 1990, before Magistrate Keith, counsel for the defendant informed the magistrate that the Government would be seeking to withdraw the defendant's admission concerning plaintiff's request No. 12. At the pre-trial conference held before Judge Hornby on August 16, 1990, the United States

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[3]In Rainbold, the Court of Appeals for the District of Columbia found that the district court erred in failing to give binding and conclusive effect to the unanswered request for admissions.

sought additional time to seek relief from its admission (Final Pre-Trial Conference Report, p.2, p. 1; Plaintiff's Post Trial Brief, p. 3). Judge Hornby stated in such a report: "any motion to be filed by the Government for relief from its admissions shall be filed immediately."[4] No such motion was forthcoming.

The court in Brook Village North Associates indicated "that the party found to be less credible may prevail because of the other side's failure to comply with the timeliness requirements of Rule 36 does not result in the type of manifest injustice contemplated under the rules." 686 F.2d at 73.

Defendant argued at trial and in its post-trial brief "that plaintiff blatantly misstates the wording of Request No. 12 by omitting its final six words -- 'as set forth in that notice.' Those words cannot

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[4]Judge Hornby's report, p. 5.

be ignored; if they could be ignored, the United States could and would have moved for relief from its admissions because the admission would have been contrary to its entire litigating position in this proceeding and would not have been true." (Defendant's post trial brief. page 7). But at the same time defendant acknowledges its concern, after initial review of Request No. 12, that an admission of such request would have the effect that by paying $977.65 John Talley fully paid the balance owed on the tax liability of the Estate of Percy Talley. This "initial review" by defendant of Request No. 12 lasted from October 1989 until the eve of trial on September 1990.

The defendant waived its right by failing to act when the rules of civil procedure required. It did not respond within thirty (30) days pursuant to the mandate of Rule 36. Not only did it have

thirty days to respond to plaintiff's request, but the Court granted defendant a four-month extension to respond. Defendant clearly ignored the request for admission and waited until trial to allege that the request did not state what plaintiff believed it meant and what plaintiff understood it would mean all through the proceedings.

By not responding to plaintiff's request for admissions within the thirty-day period of the time available before trial plaintiff relied on the deemed admissions. Therefore, this Court will give binding and conclusive effect to the unanswered requests for admissions which established that the estate tax liability has been paid in full.

Defendant in the case at bar did not ask this court now or on previous proceedings for the amendment or withdrawal of its admission by default. Defendant, at

trial and in its post-trial brief, asks this court to give a different interpretation to Request No. 12. The language of the admission of Request No. 12[5] is unambiguous. The plain wording of such an admission and both plaintiff's and defendant's knowledge of plaintiff's interpretation until the trial establish that the estate tax liability was paid in full.

It is defendant's contention that the United States is not subject to estoppel and cannot be bound by an erroneous notice. Such is not the issue in the case at bar since we find that the defendant, United States of America, is and can be bound by

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[5]"Admit that the payment of Nine Hundred Seventy-Seven and 65/100 (977.65) Dollars by John Talley concerning the notice of tax due dated November 29, 1984 (Exhibit 1) constituted full payment of the balance due on the Estate of Percy Talley as set forth in that notice."

a request of admission.[6]

Finally, defendant asks this Court to allow the amendment of the pleadings to conform to the evidence presented at trial by way of Rule 15(b) of the Federal Rules of Civil Procedure.[7]

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[6]See Beasley v. United States, 81 F.Supp. 518 (E.D.S.C. 1948).

[7]Rule 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's

On July 20, 1990, Judge Laughlin denied the United States' motion for leave to bring its counterclaim based on the government's delay in filing such a motion and the prejudice that would have caused to plaintiff.[8] On October 12, 1990, the date of the trial, defendant filed a motion to amend its answer to assert a counterclaim, and at such time this Court orally denied defendant's motion. (Transcript p. 3).

This Court allowed all the evidence presented by defendants at trial even though it did not deny or grant plaintiff's objection to it, reserving such a decision for once the briefs were filed. Plaintiff's objection was based on the grounds that the evidence presented by

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> action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

[8]Judge Laughlin's order, p. 4; Defendant's post trial brief, p. 11.

defendants was inconsistent with the request of Admission No. 12. Evidence inconsistent with a Rule 36 admission is properly excluded. See Fed. R. Civ. P. 36(b) Advisory Committee Note (1970); 999 v. C.I.T. Corp., 776 F.2d 866, 869-870 (9th Cir. 1985); Shakman v. Democratic Organization of Cook County, 481 F.Supp. 1315, 1346 n.35 (N.D.Ill. 1979). After deciding that defendant was bound by its admission of Request No. 12 this Court will not consider such evidence.

Moreover, it is this Court's opinion that there was no implied or express consent by plaintiff to try any of the issues in defendant's proposed counterclaim since plaintiff objected to all the evidence presented at trial by defendant and relied on the Court's previous ruling on the same. This Court takes into consideration that the standard to leave and amend "shall be freely given when

justice so requires," Fed. R. Civ. P. 15(b). But also takes into consideration that defendant is bound by its admission of Request No. 12 and the previous delay and undue prejudice that allowing such a counterclaim to prosper will cause on plaintiff since plaintiff proceeded to try this case based on its interpretation of the request of admission and defendant's knowledge of such interpretation.[9]

In light of the above mentioned circumstances, this Court hereby DENIES defendant's motion to conform to the evidence.

WHEREFORE, it is hereby determined by this Court that defendant, United States of America, is bound by its admission by default establishing that the estate tax liability has been paid in full.

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[9] Logan Equipment Corp. v. Simon Aerials, Inc. 736 F. Supp. 1188, 1206 (D. Mass 1990), quoting, Colmenares Vivas v. Sun Alliance Ins. Co., 807 F.2d 1102, 1108 (1st Cir. 1986).

IT IS SO ORDERED.

San Juan, Puerto Rico, July 8, 1991.

JUAN M. PEREZ-GIMENEZ
Chief U.S. District
Judge